2015 IL App (1st) 140024-U

SECOND DIVISION November 17, 2015

No. 1-14-0024

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

| THE PEOPLE OF THE STATE OF ILLINOIS, |) Appeal from the |
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| Plaintiff-Appellee, |) Circuit Court of) Cook County. |
| v. |) No. 13 CR 7754 |
| SHIRLEY MENSAH, |) Honorable |
| Defendant-Appellant. | James B. Linn,Judge Presiding. |

PRESIDING JUSTICE PIERCE delivered the judgment of the court. Justices Neville and Hyman concurred in the judgment.

ORDER

- ¶ 1 *Held*: Judgment entered on defendant's conviction for felony retail theft affirmed over her claim that the evidence was insufficient to prove that the value of the merchandise taken was more than \$300.
- ¶ 2 Following a bench trial, defendant Shirley Mensah was found guilty of felony retail theft, and sentenced to 18 months' probation. On appeal, defendant contends that the evidence was insufficient to prove that the retail value of the merchandise taken was more than \$300, and therefore, her conviction should be reduced to misdemeanor theft, and her cause remanded for resentencing.

- ¶ 3 At trial, Zachary Dart testified that on April 4, 2013, he was employed as a loss prevention detective at the Macy's Water Tower Mall store on North Michigan Avenue in Chicago, Illinois. At 7 p.m. that evening, he was monitoring the sales floor when he observed defendant near the dress department, carrying a large tan purse and selecting a number of dresses from the sales rack. Dart noticed that she was paying excessive attention to her surroundings, but not to the prices of the dresses she was selecting, and ignoring the sales associate.
- After selecting six dresses, defendant went into the fitting room and Dart waited outside. When defendant left the fitting room, she was carrying two dresses, with one hung across five hangers. Dart asked his supervisor to check the fitting room that defendant had exited, but she did not find any dresses there. Dart followed defendant to the elevator, stood next to her in the car, and observed that she had multiple dresses from the Macy's sales rack in her bag.
- ¶ 5 After they exited the elevator, Dart followed defendant as she passed several points of sale, but she never stopped to pay for the dresses. Once she exited the store into the main lobby of the mall, Dart stopped defendant and brought her back inside. He then escorted her to the office on the seventh floor where he looked through her bag and found five dresses marked for sale by Macy's. He took the dresses to one of the points of sale and scanned the tags on each of the dresses to determine their value. After scanning each dress, he printed out a receipt that showed that the total cost of the five dresses was \$594.40. That receipt was identified in court by Dart as People's Exhibit 1. Dart then identified a photograph of defendant's bag with the dresses inside, and identified himself on a surveillance video from Macy's taking possession of defendant's bag.
- ¶ 6 On cross-examination, Dart stated that he did not see defendant put any of the dresses in her bag and that she was cooperative throughout their encounter. He also stated that neither the

dresses nor the tags from the dresses were brought to court, and that he did not know the value of the items until they were scanned by the sales computer because of possible markdowns.

- ¶ 7 On re-direct examination, Dart explained that the amount on the receipt reflects the amount a cash-paying customer would have paid for the dresses on that date. He also testified that the \$594.40 amount on the receipt included a post-sale markdown, and that the receipt reflected that the non-sale price of the dresses was \$711.
- ¶ 8 On re-cross examination, Dart stated that he did not take note of the individual price of each dress, and just scanned the barcode on each tag. After repeated questioning on this point, the court interjected that "he said he looked at [the tag,] but he didn't take note of it. He was just determined to get whatever came up on the bar code and that is what he was going to document."
- ¶ 9 Chicago police officer Angela Cleveland testified that on the evening of April 4, 2013, she and her partner, Ed Montgomery, went to the security office on the seventh floor of the Macy's store in question and took defendant into custody. As she started to read defendant her *Miranda* rights, defendant interrupted her and said, "[T]imes are hard. I took the things because I needed them."
- ¶ 10 On cross-examination, Officer Cleveland stated that she included defendant's statement in her police report, but it was not signed or memorialized by defendant in any other way. She also stated that she arrested defendant based solely on the information provided by the store security guard.
- ¶ 11 The State's exhibits, including the Macy's receipt, were received by the court as evidence without objection, and the State rested. The court then denied defendant's motion for a directed finding, and defendant rested without presenting any evidence.

- ¶ 12 During closing argument, defense counsel asserted, *inter alia*, that the State failed to prove the value element of the offense with respect to the dresses. Counsel argued that Dart was not a "pricer of goods" for Macy's, and had indicated that the prices on the tags are often not the prices that ring up at the register because of markdowns. In response, the State asserted that there was no question as to the value of the dresses because of the prices displayed on the receipt, which was in evidence. The State further argued that the receipt showed the price that would have been charged to any cash-paying customer on that date, and reflected the actual price of the dresses along with the sale price, both of which were more than \$500.
- ¶ 13 In finding defendant guilty of felony retail theft, the court reviewed the evidence that defendant was in the store and caught on tape, was observed taking items into the dressing room, returning some, then walking out without paying for others. The court thus found that the State had met its burden of proof beyond a reasonable doubt. At the subsequent sentencing hearing, after considering the appropriate factors in mitigation and aggravation, the court sentenced defendant to 18 months' probation.
- ¶ 14 In this appeal from that judgment, defendant contests the sufficiency of the evidence to prove her guilty of felony retail theft beyond a reasonable doubt. She contends that Dart did not have independent, personal knowledge of the value of the dresses, and that the receipt was not properly admitted into evidence under the business records exception to the rule against hearsay. She therefore asserts that we should reduce her conviction to misdemeanor theft, and remand her cause for resentencing.
- ¶ 15 Where defendant challenges the sufficiency of the evidence to sustain her conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. *People v. Cunningham*, 212 III. 2d 274, 278 (2004). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 III. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 III. 2d 1, 8 (2011); *People v. Smith*, 185 III. 2d 532, 542 (1999).

- ¶ 16 To sustain defendant's conviction of felony retail theft in this case, the State was required to prove that she knowingly carried away merchandise offered for sale in a retail mercantile establishment with the intention of retaining the merchandise or with the intention of depriving the merchant permanently of possession without paying the full retail value of such merchandise. 720 ILCS 5/16-25(a)(1) (West 2012). For purposes of a felony conviction under the statute, the State was also required to prove that the value of the property carried away was more than \$300. 720 ILCS 5/16-25(f)(3) (West 2012). Defendant does not contest the sufficiency of the evidence to prove that she knowingly carried away merchandise with the intention of depriving Macy's of possession without paying full retail value, but contends that the State failed to prove that the value of the merchandise exceeded \$300.
- ¶ 17 Viewed in a light most favorable to the prosecution, the evidence in this case shows that after observing defendant's activities in the dress department, Dart saw her carry six dresses into the Macy's fitting room, but exit with only two of them. Dart was unable to account for the missing dresses until he saw them in defendant's large purse while they stood next to each other on the elevator. After defendant exited the store without paying for the merchandise, Dart

stopped her and escorted her to the security office where he recovered the dresses from her purse. He then scanned the price tags on each dress using a point of sale computer, and printed out a receipt, which indicated that the value of the dresses, if they were to be sold that day to a cash-paying customer, was \$594.40. That receipt was identified by Dart at trial and submitted into evidence without objection as one of the State's exhibits. This evidence, and the reasonable inferences therefrom, was sufficient to establish the value of the dresses at more than \$300, and that defendant was proved guilty of felony retail theft beyond a reasonable doubt. 720 ILCS 5/16-25(a)(1) (West 2012); ILCS 5/16-25(f)(3) (West 2012); *People v. DePaolo*, 317 III. App. 3d 301, 307 (2000).

- ¶ 18 Defendant nonetheless contends that Dart's testimony regarding the value of the dresses was insufficient to prove the value element of the offense because he did not have independent, personal knowledge of the value of the dresses. Where defendant is charged with theft of property exceeding a certain value, the value of the property is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding that value. *People v. Perry*, 224 Ill. 2d 312, 320 (2007). Questions regarding the knowledge of a witness in valuing property go toward the weight of the evidence, not its competency. *DePaolo*, 317 Ill. App. 3d at 309.
- ¶ 19 Here, Dart testified as to his employment as a loss prevention detective for Macy's, and his scanning of the price tags on the stolen merchandise in defendant's purse using a point of sale computer. The receipt generated in this process reflected the total value of the dresses as \$594.40, which included a post-sale markdown. Dart testified that this is the amount a cash-paying customer would pay for the dresses on that date, reflecting the present-day value of the dresses.

- ¶ 20 Defendant now claims that the receipt was not properly introduced into evidence under the business records exception, making the contents of the receipt inadmissible hearsay. We observe, however, that a rule of evidence not invoked by a timely objection is forfeited, and that the evidence so admitted may be given its natural probative value. *People v. Parker*, 77 Ill. App. 3d 536, 539 (1979), citing *People v. Akis*, 63 Ill. 2d 296, 299 (1976). Taken together, Dart's testimony, the computer-generated receipt showing the present value of the dresses from his scan of the tags on them, and the photograph of the dresses in defendant's bag were sufficient to allow a reasonable trier of fact to find that the value of the five dresses exceeded \$300. *DePaolo*, 317 Ill. App. 3d at 309.
- ¶21 Defendant, nevertheless, contends that Dart's testimony was insufficient to establish the value of the dresses because he lacked independent, personal knowledge of their value. Relying on *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995), she maintains that to testify about the value of merchandise, the State must establish the witness' basis of knowledge. In *Mikolajewski*, a department store security officer testified that she had seen the price tags on the stolen items, but stated that the price tags were placed on the merchandise at an out-of-state distribution center, and she had nothing to do with pricing. *Id.* at 313. None of the price tags were introduced at trial, and defendant objected to the value testimony as inadmissible hearsay. *Id.* at 314. At the close of argument, the trial court refused to tender a lesser-included offense instruction to the jury, and defendant was found guilty of retail theft in excess of \$150. *Id.* On appeal, this court found that it was error for the court to refuse an instruction on the lesser-included offense where the State's evidence of the value of the merchandise relied on the hearsay testimony of the security officer, and not the price tags, which the court noted were self-authenticating and admissible as an exception to the rule against hearsay. *Id.* at 317-18.

- ¶ 22 Here, the State provided the computer-generated receipt from the price tags on the dresses showing their value and the testimony of Dart as to how that value was ascertained. Defendant raised no objection to the entry of the receipt at trial, nor to Dart's testimony, unlike *Mikolajewski*. Accordingly, we find this situation distinguishable and that defendant has forfeited this argument for review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005).
- ¶ 23 Defendant, nonetheless, contends that Dart's testimony did nothing to show that he had independent, personal knowledge of the value of the dresses. She maintains that Dart merely scanned the price tags, and "knew nothing about the value of the items aside from what prices appeared when he scanned the items." Relying on *People v. Davis*, 322 Ill. App. 3d 762 (2001), defendant contends that Dart's testimony falls short of the foundational requirements for admission of a business record.
- ¶ 24 In *Davis*, defendant was convicted of retail theft of property worth more than \$10,000 for stealing a number of rings from a jewelry store display case. *Id.* at 763-64. In order to prove the value of the rings at trial, the State had a store employee read from a document that listed the catalogue numbers and prices of the rings. *Id.* at 764. The court overruled defendant's objection for lack of foundation. *Id.* At the close of testimony, defendant renewed his foundation objection when the State sought to admit the document into evidence. *Id.* The court overruled his objection after further argument, and defendant preserved his foundation objection for review by raising it in his motion for a new trial. *Id.* at 765. Defendant raised the same foundation argument on appeal, and this court found that the State did not establish the proper foundation for the document showing the prices of the rings, and the trial court erred by admitting it into evidence. *Id.* at 766-67.

- ¶ 25 In this case, however, defendant did not object at trial to the lack of foundation for the receipt based on Dart's testimony, and did not preserve that issue for review by raising it in a posttrial motion, contrary to *Davis*. Accordingly, defendant has also forfeited this argument for review (*Woods*, 214 III. 2d at 470 (2005)), and as noted above, this evidence, admitted without objection, could be given its natural probative value (*Parker*, 77 III. App. 3d at 539).
- ¶ 26 If a witness' testimony regarding the value of the items is properly before the court, and not contradicted, it is sufficient to show the value of the items. *DePaolo*, 317 III. App. 3d at 308. Here, as noted, defendant did not object at trial to Dart's testimony regarding the value of the dresses, and defendant had an opportunity to cross-examine Dart and contest his knowledge regarding value at that time, but did not do so. *Id.* at 309. Dart's unchallenged testimony showed that he personally scanned the price tag of each dress and determined that the collective price for the five dresses was \$540.40, as reflected on the receipt. This evidence was properly before the court, was not contradicted, and was sufficient to prove the value of the items stolen. *Id.*; *People v. Banks*, 17 III. App. 3d 512, 515 (1974).
- ¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Cook County.
- ¶ 28 Affirmed.